In The

Supreme Court of the United States

October Term, 1940.

No. 428.

HAROLD H. MOORE, Bankrupt,
Petitioner,

v.

LEONARD HORTON, Trustee in Bankruptcy,
Respondent.

PETITION FOR REHEARING.

HAROLD H. MOORE,
By RICHARD FORD,
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Now comes Harold H. Moore, Bankrupt, Petitioner, and presents this his petition for a rehearing of the above application for a Writ of Certiorari to be directed to the United States Circuit Court of Appeals for the Sixth Circuit; and in support of such petition he respectfully shows:

There continues to be a serious conflict between the several Circuit Courts of Appeals as to whether the language of Section 70 (a) of the Bankruptcy Act (11 U. S. C. A. 110a5) "property which prior to the filing

of the petition he could by any means have transferred" includes an interest subject only to *in futuro* transfer by estoppel, so-called. The division of authorities is now as follows: there is one Circuit Court of Appeals decision (or two, if the present case is counted) and at least two state supreme court decisions to the effect that such an interest is included (1); and there are two Circuit Court of Appeals decisions and at least one state supreme court decision to the contrary. (2)

Fiduciaries administering Michigan trusts, and creditors and trustees in bankrutcy in this state, who wish to enjoy their rights and perform their duties, are now caught between conflicting rules of law. The decision on which this review is sought seems to be authority for the proposition that the *cestui's* interest in this testamentary trust was personalty; in which event, by basing its decision on the Michigan real estate statute, the Circuit Court of Appeals has given to that statute a construction at variance with that given it by the Supreme Court of Michigan. (3) On the other hand if the court below intended to hold that the *cestui's* interest was not personalty, then its decision is authority against the application in bankruptcy of the Michigan statute defining the rights and interests of parties to trust, (4) and seems to determine the character of the estate in question ac-

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(1) *In re Landis, 41 F. (2d) 700 (C. C. A. 7, 1930); Reilly v. McKenzie, 151 Md. 216; Earle v. Maxwell, 86 S. C. 1.*

(2) *Suskin & Berry v. Rumley, 37 F. (2d) 304 (C. C. A. 4, 1930); In re Baker, 13 F. (2d) 707 (C. C. A. 6, 1926); Spengler v. Kuhn, 212 Ill. 186.*

(3) *C. L. Mich. 1929, Sec. 12955; Dolby v. State Highway Commissioner, 283 Mich. 609 at 620; Palms v. Palms, 68 Mich. 355 at 379.*

(4) *C. L. Mich. 1929, Sec. 12982; Culbertson v. Witbeck, 127 U. S. 326 at 334; Palms v. Palms, 68 Mich. 355 at 380.*

cording to what the court below considers to be general doctrines of the common law.

Hereafter in other litigation either the Supreme Court of Michigan or the Circuit Court of Appeals for the Sixth Circuit may recede from its position and adopt the view of the other court; but it is not probable that this will occur until after the Supreme Court of the United States intervenes. The justices of the Supreme Court of Michigan are likely to feel that it is their duty to follow their own precedents until they are expressly overruled and the Federal question, if any, framed definitely in this court. The judges of the Circuit Court of Appeals are apt to feel that denial of certiorari in this court so far amounts to an adoption of the instant decision by this court that they ought not to depart from it until it is expressly overruled here. In consequence, the law of trusts is likely to be one thing in the state courts, and something else in bankruptcy courts sitting in Michigan.

It may be said that this case is not entitled to review unless the question raised is one of public importance; but we must point out that the volume of business to be affected by this conflict of authority is large. Arizona, California, Delaware, the District of Columbia, Georgia, Idaho, Minnesota, Montana, New York, North Dakota, Oklahoma, South Dakota and Wisconsin have statutes similar to those of Michigan. (5). Probably in all of these states and certainly in Michigan, the number of testamentary trusts now being administered is large; in all these states the amount of bankruptcy business is considerable. All decisions in cases involving remainders and expectancies affect others than the immediate parties, since

(5) Statutes cited in the petition for certiorari, p. 11.

they become precedents for determining the rights of infants, incompetents, and other wards of the public.

This court has always indicated its desire to employ its Writ of Certiorari as a means of making uniform the rules of decision in the several circuits, and of preventing unnecessary conflicts between the Circuit Courts of Appeals and the higher courts of the several states. We therefore take this opportunity again to urge that this case be reviewed, so that this court can remove what is certain to become a serious and recurring conflict of authority.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit be, upon further consideration, reversed.

Respectfully submitted,

HAROLD H. MOORE,
By RICHARD FORD,
Counsel for Petitioner.

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
C. WAYNE BROWNELL,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, RICHARD FORD, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RICHARD FORD,
Counsel for Petitioner.